Supreme Court, U.S.
FILED
JUN 30 1998
OFFICE OF THE CLERK

(1)

No. 98 39

In The

# Supreme Court of the United States

October Term, 1997

EUGENE E. KLECAN and DONALD SCHAUERTE,

*Petitioners,*

vs.

NEW MEXICO RIGHTS TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

*Respondents.*

**On Petition For Writ Of Certiorari To The New Mexico Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

EUGENE E. KLECAN
Attorney at Law
5613 Fair Oak Trail, N.E.
Albuquerque, NM 87109
(505) 821-6970
*Attorney for Petitioners*

78 pp

## QUESTION PRESENTED FOR REVIEW

That question is: DOES THE COMPLAINT ITSELF REQUIRE THE DISMISSAL OF THE COMPLAINT BECAUSE OF THE DOCTRINE OF SOVEREIGNTY?

TABLE OF CONTENTS

Page

Question Presented For Review ..... i

Direct Application of Sovereignty in the Santa Fe District Court ..... 5

Jurisdiction ..... 9

Statement of the Case ..... 9

Reasons Why Our Petition Should Be Granted ..... 12

Procedures for this Petition ..... 13

The Delays in the Proceedings in the New Mexico Supreme Court ..... 15

The Delays in the Supreme Court of New Mexico .... 15

Authorities and Argument by Petitioners on Behalf of the Unborn and the Taxpayers ..... 17

Remedy ..... 19

Conclusion ..... 20

# TABLE OF AUTHORITIES

Page

CASES

*Arnold v. State*, 48 N.M. 595, 154 P.2d 257 (1994) ..... 3, 4, 8, 9, 12, 15

*Harris v. McRae*, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671 (1980) ..... 17, 20

*Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 739 (1973) ..... 17, 20

STATUTES

28 U.S.C. § 1257[123] ..... 9

Fourteenth Amendment, U.S. Constitution ..... 19

Enabling Act, 36 Statutes at Large, ch. 310, page 557 ..... 18

## PETITION FOR WRIT OF CERTIORARI

As stated in the Rules for Certiorari by the U.S. Supreme Court, a Petition should be direct, succinct, including only what is necessary for review.

Petitioners adhere to that requisite by stating:

### Question Presented For Review

That question is: DOES THE COMPLAINT ITSELF REQUIRE THE DISMISSAL OF THE COMPLAINT BECAUSE OF THE DOCTRINE OF SOVEREIGNTY? In the order of presentation dictated by the Rules of the U.S. Supreme Court, the above question is the first category and we will treat it as such. One of the later requisites as to form of presentation required by the Supreme Court Rules is JURISDICTION. As to that term jurisdiction, when used to mean the jurisdiction of this court to hear our Petition for Certiorari, the same will be noted and answered hereinafter. As to the use of the term jurisdiction as applied to the Complaint filed by the Plaintiffs in the State District Court of Santa Fe County, New Mexico, that term jurisdiction is used herein to show a complete lack of jurisdiction in the New Mexico District Court for the County of Santa Fe to hear and entertain the cause of action alleged in the Complaint by the Plaintiffs below, who are the Respondents here. The Petitioners therefore assert as the reason for this Petition that there never was, never has been and is now no jurisdiction in the New Mexico District Court to hear the Complaint filed by the Plaintiffs against Defendant which was the State of New Mexico, acting through its Human Services Department, a branch of the Executive Department of the State of New

Mexico government. That lack of jurisdiction existed from the very beginning because of the aforementioned doctrine of sovereignty of the State of New Mexico government. This necessarily zeros in on the Complaint in the District Court of Santa Fe County, which has never been altered from the date it was filed. That Complaint by the Plaintiffs below is set out in the appendix, page one, and will be referred to hereinafter in this Petition as Exhibit 1. In a true sense, that Complaint is all determinative.

That Complaint is by a non-governmental person and the State of New Mexico through its Human Services Department, which is a part of the executive department, is the Defendant. That Complaint asks for declaratory relief in accordance with a statute of the State of New Mexico. The Complaint attacks a proposed HSD Resolution alleging the Resolution is unconstitutional, according to the State of New Mexico's Constitution. That Resolution itself says that abortions for medically necessary reasons cannot be funded with New Mexico taxpayers' funds. The above Complaint by abortion organizations, abortion providers, abortionist doctors, was filed to prevent the taking effect of that HSD Resolution, which Resolution said that the State of New Mexico would not fund abortions for medically necessary reasons (Exhibit 2, Appendix ___), and so, the Complaint seeks to prevent any interference with the ongoing policy of abortions at New Mexico taxpayers' expense. The attack therefore is by private individuals seeking to prevent the taking effect of a Resolution which would alter and amend the prior Resolution. Petitioners submit that the doctrine of sovereignty demands the dismissal of the Complaint since it was void at the time it was filed on April 21, 1995.

Petitioners will now be brief and succinct and direct in following the rules of the United States Supreme Court for certiorari. First point, sovereignty of the State of New Mexico, is attacked by the Complainant because *the State is being sued by its own citizens without its consent.* The above statement about sovereignty cannot be attacked, minimized or qualified according to the laws of the State of New Mexico. Sovereignty is an attribute attached to the nature of a government, in this case, the State of New Mexico.

In keeping with our policy of briefness and directness, we assert that there is one case from New Mexico which is a case on sovereignty and we directly assert that it controls.

The rules of Sovereignty are superior to any Constitutional rights. In this case, the Plaintiffs in their Complaint allege unconstitutionality as the basis for their declaratory judgment. Sovereignty is *superior* as a right of the government to constitutional rules, at least insofar as constitutional principles of the New Mexico Constitution are the basis of the Plaintiffs' Complaint against the State of New Mexico.

We cite one case which controls. It is a sovereignty case. It is *Arnold v. State,* 48 N.M. 596, 154 P.2d 257, a Supreme Court of New Mexico case decided December 16, 1944. We assert that the principles stated in that case about sovereignty completely control the instant case. We attach that case as Exhibit 3. In direct terms, as required by the Rules, we submit that the unconstitutional provisions found by the lower court, such as the Equal Rights Amendment, have no bearing because these particular

Plaintiffs with their particular Complaint run directly into the sovereignty of the State of New Mexico. To quote from a headnote on the *Arnold v. State,* supra, case, "A sovereign state cannot be sued in its own courts without its consent." The opinion itself at page 598 of *Arnold,* supra, says the same as follows: "In *State ex rel. Evans v. Field,* 27 N.M. 384, 201 P. 1059, 1060, we said 'It is a fundamental doctrine at common law and everywhere in New Mexico that no sovereign state can be sued in its own courts or in any other without its consent and permission.' " *Arnold v. State,* supra, continues saying, "Indeed so fundamental is the lack of consent that it was treated as jurisdictional in the foregoing case and permitted to be raised for the first time in this court." In our case, this Petition is not the first time that your Petitioners have raised the issue of sovereignty. *Arnold v. State,* supra, continues by showing that the declaratory judgment statute did not remove the sovereign protection of the State of New Mexico. This is precisely the same situation as in our case. Our Supreme Court way back in 1944 treated the matter because the Declaratory Judgment Act involved in the *Arnold* case, supra, seemed to allow possibly a suit against the State under that Declaratory Act. The *Arnold* case directly denied the right of a person to sue the State of New Mexico and the reason was the application of the doctrine of sovereignty. So important as decisive of our case was the ruling of the Supreme Court of New Mexico in *Arnold,* supra, that we quote the exact language of that opinion.

In Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027, 1032, in a

> case decided only a few years following enactment of this legislation, the likelihood that this language would soon be relied upon as constituting a general immunity on the part of the state to be sued under the provisions of the act was sensed. The matter was considered and we said: ' . . . We take this first opportunity to correct any impression that section 3 of the act is a general consent on the part of the state to be sued under its provisions. We are agreed that it has no uch meaning and has no greater effect, insofar as this consideration is concerned, than merely to permit parties to sue the state under the act where the state's consent to be sued otherwise exists and the facts warrant suit."

We attach as Exhibit 5 the decree of the lower court of Santa Fe County and as Exhibit 4, a finding of fact and conclusion. Obviously, he is interpreting the Complaint as a declaratory judgment and proceeds to put that declaration into his final decree.

## DIRECT APPLICATION OF SOVEREIGNTY IN THE SANTA FE DISTRICT COURT

As stated above, there are no changes in the Complaint since the filing date of April 21, 1995. The Petitioners herein also raise the defense of "no right to sue a sovereign" from the very beginning and the District Court Judge Steve Herrera disputed that point from the very outset. This direct dispute between Petitioners herein, Defendant Intervenors below, and the District Judge, appears in detail form in the transcript of the argument on summary judgment which preceded the

State District Judge's ruling. At page 57 of the transcript of the proceeding described above on June 5, 1995, we have the direct conflict described above on the question of sovereignty. It was raised by attorney Klecan for the Intervenors in these words on page 57, transcript June 5, 1995.

Mr. Klecan: If as a matter of fact it dawns upon me, and I have researched the law extensively, that sovereign immunity is involved in this case and I read all the cases at the University library on that point, and I'm convinced that the plaintiffs have no right to sue the State of New Mexico because of the sovereign immunity doctrine. The cases all hold in this case of a case in my opinion that you can't sue the state.

Court: So the state can act unconstitutionally and no one can ever sue to prevent it?

* * *

Court: So again my question is still the same, which you haven't answered. Does that mean that the state can act unconstitutionally and no one can ever challenge it because they have sovereign immunity?

Mr. Klecan: Well, I addressed that problem and directly in my own thinking and I'm saying that the first premise of the whole thing is the right to sue.

Court: Right.

Mr. Klecan: So, you know, if your contention is correct or not your contention, the other side of it is that anybody that claims I've got a constitutional issue he can go ahead and sue the state and we have it's very safe and that it's been tried but every time except on tort claims has decided since that time and that's an exhaustive opinion that goes into the history since we've had it ever since this was a state, this sovereign immunity.

Court: So your position is that they can or they cannot sue if they think the state is doing something unconstitutionally?

Mr. Klecan: That these particular plaintiffs, that is the four individual doctors, have their own interests. There have been two or three attempts and organizations that say they are being deprived of their right to send people to the abortion doctors or perform them themselves like planned parenthood, *that they cannot sue the state under the sovereign immunity doctrine, and your question goes right to the point.* (Italics supplied).

If it's the other side of the coin then all they have to do is say the state is acting unconstitutionally so that does away with the sovereign immunity doctrine.

Obviously, Judge Herrera of the Santa Fe District Court rejected the sovereign immunity doctrine as applied to the case and stated the superiority of the Constitution of the State of New Mexico over the doctrine of sovereign immunity. Therein in brief and completely accurate terms is the issue in this case. Judge Steve Herrera, as quoted above, held to the contrary. There can be no doubt as to the correctness of sovereign immunity being superior to Constitutional provisions. As viewed in the Complaint, Exhibit 1, it states only Constitutional reasons based on the New Mexico Constitution as a basis for its claim for temporary injunction and permanent injunction, both of which were granted. There were other reasons for the opposition to the Complaint, but our position is that the Complaint was void at its filing by virtue of the doctrine of sovereign immunity which New Mexico clearly follows. It is highly significant that the case filed by the Plaintiffs in the District Court of Santa Fe County asked for a declaratory judgment. In the New Mexico case above cited, *Arnold v. State,* supra, also involved a declaratory judgment act for New Mexico, which act seemed to allow a declaratory action against the State of New Mexico: however, the opinion itself deals directly with that situation and declares that anything in the declaratory judgment act contrary to the sovereign immunity of the State of New Mexico to be sued was inferior to the protection afforded the state under the doctrine of sovereign immunity. Nothing could be clearer than that conclusion and decision in *Arnold v. State,* supra.

We decline to belabor the point any further. Justice Herrera decided the case against the sovereign who cannot be sued. *Arnold v. State,* supra.

## JURISDICTION

The jurisdiction of the United States Supreme Court to hear Petitions like the instant one, on certiorari from a state court and involving the federal issue is pursuant to 28 U.S.C. §1257[123], as part of the appellate jurisdiction of the U.S. Supreme Court. The denial usually required by a state Supreme Court is not found in this case in its usual context. This is not to assert that the jurisdiction asserted by certiorari relative to a case from a state court is not authorized. That matter will be treated hereinafter in this Petition.

## STATEMENT OF THE CASE

This case had its origin in the State Court of New Mexico for Santa Fe County on April 21, 1995. It was a Complaint by the Respondents against Dorothy Dansfelser, Secretary of the New Mexico Human Services Department as defendant. Within four working days, the Petitioners, Eugene E. Klecan and Donald Schaurete, who replaced John R. Linton, were granted the right of intervention by Judge Herrera, District Judge for Santa Fe County, and they participated in every proceeding in Santa Fe County District Court, New Mexico Supreme Court and in other proceedings in this United States Supreme Court. As the caption indicates, they were and

are opposed to the Respondents on all the issues in all courts. The Human Services Department, a branch of the executive department, was the original defendant and became an appellant in the New Mexico Supreme Court in August 3, 1995. Shortly thereafter, August 14, 1995, the petitioners herein also became appellants and by virtue of a pleading in the New Mexico Supreme Court by the appellees, the defendants in intervention below, appellants in the Supreme Court, also became appellees on the cross appeal. On July 26, 1994, the District Court of Santa Fe County filed its judgment, a copy of which is attached as Exhibit 5. It was a Judgment that was appealed in August of 1995. The facts and pleadings of the case actually began on December 1, 1994 at which time the then executive department under Governor Bruce King issued an executive resolution which drastically changed the abortion program in New Mexico. Prior to December 1, 1994, medically necessary abortions were not allowed in New Mexico and had never been allowed. The executive resolution attached as Exhibit 6 allowed medically necessary abortions. As of January 1, 1995, a new Governor came into office and shortly thereafter, issued an HSD Resolution which restored abortions to the same situation as had prevailed prior to December 1, 1994, which meant that medically necessary abortions were not allowed. The original abortion situation was part of the Medicaid Act whereby the State of New Mexico, like practically all other states, together with the federal government, adopted a Medicaid plan with reimbursement for the combined Medicaid services, being apportioned between the federal government and the state government with the federal government bearing the major cost of the

expenditures under the Medicaid Act. There is no legislative act of the Legislature of the State of New Mexico which provided for abortions for medically necessary reasons. The instant Complaint was filed by the Respondents for the purpose of declaring the medically necessary abortions to be valid because as the Complaint alleges, the Respondents here and Plaintiffs below, the appellees in the New Mexico Supreme Court, claimed that the new Resolution replacing the December 1, 1994 Executive Resolution was unconstitutional. There have been no pleading changes from the April, 1995 filing date of the complaint.

Santa Fe District Judge Steve Herrera granted the first prayer for relief by the Plaintiffs below and enjoined the substitution of the HSD Resolution, which would have returned the abortion picture to the situation prevailing December 1, 1994 when medically necessary abortions were allowed.

The final decree by Judge Herrera authorized abortions at taxpayers' expense, which had been started on or about December 1, 1994, when the prior Governor, through his Secretary of the HSD, authorized abortions at the public expense through the HSD. The Resolution of the succeeding HSD did not take effect because of the order by Judge Herrera enjoining the same, which restored the ongoing program of abortions at public expense which began as a result of the HSD Resolution of December 1, 1994. We repeat, the State of New Mexico through the HSD in which the Secretary of the HSD was the named defendant became an appellant with the intervenors in the New Mexico Supreme Court. The pleadings

have not been changed during the course of the proceedings in the appellate courts, both in the New Mexico Supreme Court and in the United States Supreme Court.

The Complaint originally filed in the District Court of Santa Fe County asks for a "temporary restraining order, preliminary injunction, permanent injunction, and declaratory judgment." The Plaintiffs below were successful in obtaining approval by the ruling of the Santa Fe District Court Judge, which was dated July 26, 1995 and which was the final judgment on which the appeals were based. Exhibit 5, supra.

## REASONS WHY OUR PETITION SHOULD BE GRANTED

The reason is simple, direct and concise for granting this Petition for Certiorari because the Complaint is by private individuals against the State of New Mexico and the Complaint was a nullity at the time it was filed pursuant to the doctrine of sovereign immunity, which New Mexico had and has and which was laid down as applying to a declaratory judgment act in the case of *Arnold v. State,* supra. Further, the District Court Judge, Steve Herrera, directly addressed that doctrine, namely, sovereign immunity, and expressly found the Constitutional provisions were superior to the sovereign immunity doctrine. Nothing has changed since the date the case was filed on April 21, 1995. The arguments were set out above at the time of the closing arguments between Petitioners and Judge Herrera. New Mexico as a state has no sovereign status for the time honored attributes of a

sovereign if the conclusion of Judge Herrera as stated above is correct. The doctrine of sovereignty cannot be waived; it can be found by the Court on its own motion and the Enabling Act whereby the State of New Mexico came into the Union obligates the federal government to protect the sovereign status of the State of New Mexico against complaints similar to the Complaint that was filed by the Plaintiffs herein. If, as pointed out in the final arguments quoted between Petitioners' counsel and Judge Herrera, the State can be subjected to Complaints similar to the one filed in this case under the guise that it is unconstitutional, then anyone can attack the State and involve it in any number of actions claiming unconstitutionality about a proposed Resolution which the complainant claims is unconstitutional. Only the doctrine of sovereign immunity can protect a sovereign like the State of New Mexico from being destroyed at the instance of lawsuits claiming that a proposed Resolution by the Executive Department is unconstitutional.

## PROCEDURES FOR THIS PETITION

On May 6, 1998, the Supreme Court of New Mexico denied our motion for a stay pending a decision on the merits of the appeal. This was a motion that we had made two days before on May 4, 1998. A copy of the denial is attached as Exhibit 8. A copy of Intervenors' Motion for a Stay filed May 4, 1998 is attached as Exhibit 7.

There is no final order or decision from the New Mexico Supreme Court, even though the final judgment in the District Court was July 26, 1995. The denial of our

Motion for a Stay, dated May 6, 1998, we assert as grounds for this Petition. The case was appealed in August, 1995 and the proceedings or lack thereof are set out in more detail in subsequent paragraphs of this Petition. The essence of our reasons for filing for certiorari in this court were motivated by the failure of the New Mexico Supreme Court to rule on the issues, even though the case has been there since August, 1995 and all appeal pleadings were filed by January, 1996. The reasons justifying the use of this Petition for a Writ of Certiorari are covered hereinafter. We cannot be deprived of our right to appeal to this court because the Supreme Court of the State of New Mexico has not decided the case. If they would decide the case, we could petition this court for certiorari. We have attached the Order from the New Mexico Supreme Court of May 6, 1998 denying our Motion for a Stay (Exhibit 8) believing that that refusal can be considered as a basis for requesting this Court to grant a Writ of Certiorari. Meanwhile, abortions have been continuing at public expense since December of 1994 and now approximate thousands. Copy of partial statistics is attached as Exhibit 9, all at New Mexico taxpayers' expense.

We assert that there is a deprivation of "due process" according to the U.S. Constitution when the Supreme Court of New Mexico declines to decide the case, thereby giving us the right to take this Petition to this Court. We submit that there is a complete breakdown in the functioning of the State of New Mexico Supreme Court, thereby denying us "due process" rights, thereby resulting in this Petition which is based upon the sovereign

right of the State of New Mexico not to be sued in its own courts. *Arnold v. State,* supra.

## THE DELAYS IN THE PROCEEDINGS IN THE NEW MEXICO SUPREME COURT

While on appeal, the Petitioners herein moved the New Mexico Supreme Court to enforce a mandatory stay which was a legislative act and which had not been recognized. The basis of the mandatory stay was the presence of the State of New Mexico through the HSD as the real defendant and as the agency through which abortions were processed and paid for. The Supreme Court of New Mexico denied that motion and the abortions at public expense to New Mexico taxpayers continued. Recently, that is on May 6, 1998, the Petitioners filed again for a stay, which was denied. The basis for these requests for a stay were predicated on the fact that abortions were continuing during all this period despite the fact that the case was on appeal. No indication came from the New Mexico Supreme Court as to why the stay motions by the Petitioners herein were denied.

## THE DELAYS IN THE SUPREME COURT OF NEW MEXICO

All of the briefs, including numerous amici, were completed by January, 1996. The case was scheduled for oral arguments in the New Mexico Supreme Court for April 9, 1996. A few days before the hearing, the clerk's office issued the document calling for a vacating of the

April 9, 1996 hearing. A copy of that is attached as Exhibit 10 and is highly significant because of its vital importance. Pertinent provisions of that order are hereby quoted. They are in the first two paragraphs.

> Enclosed is an Order vacating the oral argument setting on Tuesday, April 9, 1996, at 1:30 P.M. Oral argument will be reset at the earliest on the August, 1996 calendar, but not later than October or November, 1996.
>
> Because of the important nature of the issues, Justice Frost's retirement effective May 31, 1996, and the fact that the Governor will have a list of names from the judicial nominating commission on June 4th, the court feels that vacating the April setting is in everyone's best interest.

The last statement above which says "Vacating the April setting is in everyone's best interest" was obviously incorrect since abortions had been continuing since December 1, 1994 on a daily basis. Vacating the April 9, 1996 setting continued the destruction of New Mexico's unborn solely at New Mexico taxpayers' expense. The Petitioners herein, Eugene E. Klecan and Donald Schaurete, have lost their efforts to save the lives of the unborn and the expenditure of the taxpayers' funds. Those abortions are still continuing. We emphasize the letter quoted above of March 28, 1996 when it says "oral argument will be reset at the earliest on the August, 1996 calendar, but *not later than October or November, 1996.*" This assurance has not been realized. The case was not reset in November, 1996. We state that the harm to that class identified as the unborn of New Mexico is irreparable and is continuing up to the present day. We submit that the broken promise referred to above about a resetting date is in

violation of the New Mexico Supreme Court's own statement, a violation of federal Constitutional rights of "due process." That class, namely, the unborn, also the taxpayers' funds, had a right to a speedy determination of their right to be born. We continue with our equitable and humanitarian argument by telling the Court that this case was not reset until March, 1997, at which time the case was set for oral arguments for June 30, 1997 and arguments were had at that particular time. But no decision has come down to this very date June 29, 1998. We have stated previously, even back at trial court, that authorizing abortions when the ruling of the trial court is on appeal constitutes a violation of the procedures granted even to convicted felons whose death sentence was on appeal to the Supreme Court or the federal court from a state court. Obviously, there is a violation of "due process."

## AUTHORITIES AND ARGUMENT BY PETITIONERS ON BEHALF OF THE UNBORN AND THE TAXPAYERS

First, *Roe v. Wade,* 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 739 (1973) never allowed abortions at public expense. *Harris v. McRae,* 448 U.S. 297, 65 L.Ed. 2d 784, 100 S. Ct. 2671 (1980) denied social security funds of the federal government to pay for abortions for reasonably necessary reasons. But, in a footnote said that the matter could be taken to the states "via the democratic process." A decision even contrary would raise the right of certiorari to this Court. We see that the Final Judgment by Judge Herrera in Santa Fe County, filed July 26, 1995, (Exhibit 5) is the judgment that would yield to a Petition

for Certiorari to this United States Supreme Court *if* the New Mexico Supreme Court would act, which they have declined to do. We therefore identify our recent Motion for a Stay to the New Mexico Supreme Court on May 6, 1998, and which was denied on May 8, 1998, as the appealable order. If we don't have an opinion or a decision on the July 26, 1995 Final Judgment of Judge Herrera, we cannot appeal that obviously. Normally, a refusal of the stay does not rise to the category of a Final Judgment insofar as an appeal is concerned. However, under the delaying circumstances of this case and considering the fact that unborn have been aborted in large numbers and continue to be aborted to this very day, which would certainly be in violation of comparable rights in a felon on death row.

In addition, we have the broken promise of the New Mexico Supreme Court that the case would be set for oral arguments no later than November, 1996. Exhibit 10. It is the continuation of abortions that make this Petition to the United States Supreme Court resemble a death row appeal by a convicted felon. However, this Petition is fundamentally based on the assertion of the doctrine of sovereignty which nullifies the Complaint *ab initio*. We submit that the failure of the New Mexico Supreme Court to render a decision cannot deprive the Petitioners of the right to bring this Petition for a Writ of Certiorari. We submit that under these circumstances, the denial of this writ would be a violation of the Enabling Act by which the State of New Mexico came into the Union of the United States of America in 1912. As pointed out above, this has per se deprived us of the right to file a Petition for Certiorari in this court. We believe and assert that this

is a basis for this court assuming jurisdiction. Fourteenth Amendment, U.S. Constitution.

## REMEDY

No attempt is made to litigate for those of the unborn who have been eliminated by virtue of past abortions. We are aware and have so asserted in other of our pleadings in this court that one of the grounds for a stay while the case is pending is the belief as to the successful outcome in the future of the litigation in question. This does not apply to an abortion situation. For the reason that we have already stated, namely, that this lawsuit is an attack upon the sovereignty of the State of New Mexico and therefore has no adversary status by which they can litigate. Therefore, we are requesting this court and it certainly has the authority and jurisdiction, to order a dismissal of the lawsuit. The numbers of abortions performed and the thousands of dollars expended need not be argued. As is certainly true, sovereignty of the State of New Mexico as applied to this case is not debatable or issuable. Anything to the contrary exposes all government acts to attack by non-injured persons and would be based only on the fact that the nongovernmental plaintiffs and non-injured plaintiffs want the governmental act eliminated.

## CONCLUSION

Viewed from this viewpoint, which we submit is the only possible viewpoint for this particular Complaint, the issues of abortion *vel non*, pro choice versus pro life, etc., are all irrelevant leading to the conclusion *that this is not an abortion case*. It is strictly a question of the sovereign immunity of the State of New Mexico to be sued. What practical conclusions can be drawn insofar as abortion issues, etc., is completely irrelevant, including what has happened in the State of New Mexico as a result of various resolutions by the Executive Department. A decision enforcing sovereign immunity cannot look forward to what might be the practical consequences of dismissing the Complaint. To try to forecast the course of the abortion issues, the progress or application of *Roe v. Wade* or *Harris v. McRae* are all beside the point. Petitioners herein raised sovereign immunity in the trial court. See pp. 5, 6, 7, supra, also in our Brief in Chief to the New Mexico Supreme Court under "Sovereign Immunity Argument." Exhibit 11. We stand in that position and ask this Court to declare the Complaint void from the time it was filed.

Respectfully submitted,

EUGENE E. KLECAN
5613 Fair Oak Trail, N.E.
Albuquerque, NM 87109
(505) 821-6970
*Attorney for Petitioners*
License #1418 admitted 1953

## EXHIBIT LIST

Exhibit 1
Complaint ..... App. 1

Exhibit 2
HSD Resolution ..... App. 17

Exhibit 3
*Arnold v. State* ..... App. 20

Exhibit 4
Conclusion of Santa Fe County District Court ..... App. 27

Exhibit 5
Santa Fe County District Court Decree ..... App. 28

Exhibit 6
Executive Resolution ..... App. 30

Exhibit 7
Intervenor's Motion for a Stay ..... App. 39

Exhibit 8
Denial of Motion for a Stay ..... App. 47

Exhibit 9
Partial Statistics ..... App. 49

Exhibit 10
Notice Vacating Trial of April 9, 1996 ..... App. 50

Exhibit 11
Appellant Intervenors Brief in Chief p. 9, 10 ... App. 53

EXHIBIT 1

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF95-867(c)

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant.

# COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

## I.

## JURISDICTION AND VENUE

(Filed Apr. 21, 1995)

1. This is an action for declaratory and injunctive relief brought pursuant to N.M. Stat. Ann. § 44-6-1 to § 44-6-15 (Repl. Pampl. 1978), the New Mexico Declaratory Judgment Act. An actual controversy exists between the parties because the New Mexico Human Services Department has promulgated a regulation, scheduled to

take effect May 1, 1995, that violates Plaintiffs' state constitutional rights. The regulation prohibits Medicaid funding of all abortions except those necessary because the pregnancy is life-threatening or results from rape or incest. Final Regulation Governing Pregnancy Termination Procedures, N.M. Human Serv. Reg., April 18, 1995 (to be codified as Regulation 766) ["the challenged regulation"]. Medicaid-eligible women who carry to term will continue to receive coverage for pregnancy-related care when medically necessary.

2. The Medical Assistance Program's discriminatory funding scheme burdens the exercise of the rights of privacy, reproductive choice, equality, and health, in violation of the New Mexico Constitution. N.M. Const. art. II, §§ 4 (inherent rights), 18 (due process, equal protection, equal rights amendment).

3. Jurisdiction is conferred on this Court by N.M. Const. art. VI, § 13; N.M. Stat. Ann. § 38-3-1.1 (Cum. Supp. 1994); § 44-6-2 (Repl. Pamp. 1978). Venue is proper in this judicial district pursuant to N.M. Stat. Ann. § 38-3-1(G) (Cum. Supp. 1994).

## II.

## PARTIES

### A. Plaintiffs

4. Plaintiff New Mexico Right to Choose/NARAL (NM Right to Choose), located in Bernalillo County, New Mexico, is a not-for-profit, statewide organization dedicated to preserving and promoting the right of reproductive choice in New Mexico. NM Right to Choose has

among its members women of childbearing age who are eligible for medical assistance and who may during the pendency of this lawsuit seek medically necessary abortions. In this action, NM Right to Choose asserts its own interest as an advocacy organization and the interests of its members who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

5. Plaintiff Abortion & Reproductive Health Services (ARHS) is a nonprofit reproductive health care facility in Albuquerque, New Mexico, that provides reproductive health services, including abortion. Many of ARHS' patients who seek abortions are eligible or certified for Medicaid. ARHS on occasion waives or reduces its fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, ARHS asserts its own interests and the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

6. Plaintiff Planned Parenthood of the Rio Grande (PPRG) is a New Mexico nonprofit corporation. PPRG operates two reproductive health care facilities in Albuquerque, New Mexico, a reproductive health care facility in Santa Fe, New Mexico, and an education and referral office in Taos, New Mexico. Although PPRG does not provide abortions, it offers counseling and referral on pregnancy options, including prenatal care, adoption,

and abortion. The majority of PPRG's clients are eligible or certified for Medicaid. PPRG loans funds to women who need but cannot afford abortions, including those denied state assistance. In this action, PPRG asserts its own interests and the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

7. Plaintiff Curtis Boyd, M.D., is a physician providing reproductive health services, including abortion, in his private practice in Albuquerque, New Mexico. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Boyd on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Boyd asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

8. Plaintiff Lucia Gies, M.D., is a physician providing reproductive health care services, including abortion, in her family practice in Santa Fe, New Mexico. Many of her patients who seek abortions are eligible or certified for Medicaid. Dr. Cies on occasion waives or reduces her fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Cies asserts her own interests and the interests

of her patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

9. Plaintiff Bruce Ferguson, M.D., is a physician providing reproductive health care services, including abortion, in his private practice and at the Abortion & Reproductive Health Services Clinic, both of which are in Bernalillo County. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Ferguson on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Ferguson asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

10. Plaintiff Lewis Koplik, M.D., is a physician providing reproductive health care services, including abortion, in his private family practice and at Abortion and Reproductive Health Services, both of which are in Bernalillo County. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Koplik on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Koplik asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program,

but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

**B. Defendant**

11. Defendant Dorothy Danfelser is the Acting Secretary of the New Mexico Human Services Department ("the Department") and is sued in her official capacity. The Secretary of Human Services has the responsibility for administering, and for adopting and implementing regulations necessary to administer, the New Mexico Medical Assistance Program. N.M. Stat. Ann. § 27-1-2, 27-1-3 (Repl. Pampl. 1992).

## III.

## FACTUAL ALLEGATIONS

12. Medicaid is a joint federal-state entitlement program that provides medical assistance to the poor. 42 U.S.C.A. §§ 1396b(a)(1), 1396d(b) (West Supp. 1993). Federal law sets out mandatory and optional categories of services funded under Medicaid. 42 U.S.C.A. §§ 1396(a)(10), 1396(a) (West Supp. 1993).

13. As a condition of federal participation in a state's medical assistance program, Congress mandates that each state provide pregnancy-related benefits to women with family incomes up to 133% of the federal poverty level; federal financial participation remains available for such services up to 185% of the poverty level for states that either opt or are required to fund at this higher level. 42 U.S.C.A. § 1396a(1)(2)(A)(i), (ii), (iv) (West Supp. 1993).

14. Under the Hyde Amendment, federal Medicaid funds may be used to reimburse those abortions necessary to save a woman's life or where the pregnancy results from rape or incest. Pub. L. 103-333, 108 Stat. 2539, § 509 (1994). States remain free, however, to include abortions among those services reimbursed with state funds.

15. Consistent with the federal Medicaid statute, New Mexico has chosen to provide medical assistance to needy men and women in the State. N.M. Stat. Ann. §§ 27-2-12, 27-2-9 (Cum. Supp. 1994); State of New Mexico, *Medical Assistance Division Provider Manual* (Feb. 1, 1995). Benefits include physician, hospital, laboratory, hospice, reproductive health, and midwife services, among others. State of New Mexico, *Medical Assistance Division Provider Manual*, Regs. 602, 711.33, 718.1, 721, 762.3, 763 [hereinafter "MAD Reg.(s) ___"]. Pregnancy-related care is provided to women with family incomes below 185% of the federal poverty level, and pregnant women who are eligible for the Aid to Families with Dependent Children Program ("AFDC") can receive all services covered in the Medical Assistance Program. MAD Regs. 402.24, 402.21. New Mexico provides Medicaid funding for all covered services that are medically-necessary for Medicaid-eligible men.

16. On April 18, 1995, in the absence of a statutory mandate, the Department issued the challenged regulation scheduled to take effect May 1, 1995. That regulation provides for Medicaid funding for abortions only under the following circumstances:

a. The life of the recipient will be endangered should the pregnancy be allowed to continue, as certified by the treating physician;

b. The procedure is required to terminate a pregnancy resulting from rape or incest, as certified by the treating physician and/or the appropriate reporting agency; or

c. The procedure is necessary for termination of an ectopic pregnancy. MAD Reg. 766. Transportation costs and other expenses associated with a non-covered abortion are themselves non-reimbursable. MAD Reg. 605.

17. With this challenged regulation, abortions will not be funded in the Medical Assistance Program in the same manner as are other pregnancy-related services. Coverage for prenatal care, labor and delivery costs, family planning, postpartum care, emergency room services, and diagnostic procedures will continue to be provided to Medicaid-eligible pregnant women whenever medically necessary. MAD Regs. 705.1, 762.

18. The challenged regulation will repeal a regulation which became effective on December 1, 1994. The December 1, 1994 regulation expanded Medicaid coverage of abortions to circumstances where the pregnancy was the result of rape or incest, and where the abortion was "medically necessary" as defined by the regulation. MAD Reg. 766. The December 1, 1994 regulation defines medical necessity to include only those abortions necessary because "the pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual." MAD Reg. 766.4.

19. Under that regulation, state assistance for abortions in uniquely restricted. For other covered services, the definition of medical necessity is entrusted to the physician. MAD Regs. 705.1, 711.3. The December 1, 1994 regulation also conditions medical assistance for abortions for a minor on parental consent, except in those instances in which the abortion is lifesaving, the pregnancy results from rape or incest, or a physician and independent counselor certify that the minor is sufficiently mature to make the decision in her best interest in consultation with here physician. MAD Reg. 766.63. No other service covered by the Medical Assistance Program is subject to a similar requirement.

20. Prior to the December 1, 1994 regulation, Medicaid coverage for abortion was available where the pregnancy was life-threatening or resulted from rape or incest.

21. While pregnancy carries with it health and life risks for all women, the risks are particularly significant for women with preexisting health conditions, including hypertension, heart disease, cancer, diabetes, schizophrenia, and other physical and mental health disorders. Some women develop serious health problems because of their pregnancies, including gestational diabetes, pregnancy induced hypertension, and depression. Pregnancy presents particular health risks for young women, as well as risks to the physical and mental health of women in myriad other circumstances.

22. The challenged regulation will force physicians in New Mexico, when treating low-income pregnant women with these and other health problems, either to

perform medically indicated abortions for free, which many physicians cannot afford to do on any consistent basis, or to wait, closely monitoring the patient's deteriorating health, until she delivers or the pregnancy becomes life-threatening so that an abortion is reimbursable.

23. Access to an abortion provider is a problem for many Medicaid-eligible women in New Mexico, as abortions are performed in few counties. Without state assistance most Medicaid-eligible women have great difficulty paying for abortions, transportation and other related expenses. With the challenged regulation, Medicaid-eligible women will be forced to delay the procedure as they attempt to raise the money. Although abortion is safer than childbirth, the health risks associated with abortion increase significantly with delay.

24. Under the challenged regulation, many Medicaid-eligible women seeking abortions will be forced to carry pregnancies to term or pursue alternatives to legal abortion to end their pregnancies. Many will suffer foreseeable psychological and physical harm, as well as economic and other consequences.

25. There is no fiscal or other justification for the Defendant imposing these harms upon low-income women in New Mexico.

26. This suit is being brought by Plaintiffs against the Defendant because the Executive Branch of the State of New Mexico has refused to perform its duty to uphold the Constitution of the State of New Mexico and not to act in a manner that its unconstitutional. The Executive Branch through the Defendant has engaged in bad faith

and has willfully disregarded the constitutional rights of indigent women in the State of New Mexico.

V.

## FIRST CAUSE OF ACTION; FOR VIOLATION OF THE STATE INHERENT RIGHTS CLAUSE

27. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 26 inclusive.

28. Article II, § 4 of the New Mexico Constitution provides: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

29. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates Plaintiffs' inherent and inalienable rights of life, liberty, safety, and happiness by impermissibly infringing Plaintiffs' exercise of their reproductive choice guaranteed by the inherent rights clause.

## VI.

## SECOND CAUSE OF ACTION: FOR VIOLATION OF THE STATE DUE PROCESS CLAUSE

30. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 29 inclusive.

31. Article II, § 18 of the New Mexico Constitution (the "due process clause") provides in relevant part: No person "shall be deprived of life, liberty or property without due process of law."

32. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates Plaintiffs' rights to privacy and reproductive choice guaranteed by the state due process clause.

## VII.

## THIRD CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL PROTECTION CLAUSE

33. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 32 inclusive.

34. Article II, § 18 of the New Mexico Constitution (the "state equal protection clause") provides in relevant part that no person "shall . . . be denied equal protection of the laws."

35. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results

from rape or incest, while providing coverage for all other medical services related to childbirth, the Defendant impermissibly discriminates between women who need medical care to carry a pregnancy to term and women who need medical care to terminate a pregnancy. This discrimination infringes a women's fundamental right to choose whether or not to continue a pregnancy, in violation of the state equal protection clause.

## VIII.

## FOURTH CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL PROTECTION CLAUSE

36. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 35 inclusive.

37. By denying coverage for abortions necessary to preserve a woman's health, providing coverage instead only when an abortion is necessary to save a woman's life or the pregnancy is a result of rape or incest, the Defendant creates a distinction between medically necessary and lifesaving procedures that is not substantially, or even rationally, related to any important government interest, in violation of the state equal protection clause.

## IX.

## FIFTH CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL RIGHTS AMENDMENT

38. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 37 inclusive.

39. Article II, § 18 of the New Mexico Constitution (the "state equal rights amendment") provides in relevant part, "[e]quality of rights under law shall not be denied on account of the sex of any person."

40. The state equal rights amendment prohibits discrimination on the basis of sex.

41. By providing medical assistance to eligible men whenever a covered service is medically necessary while providing abortions to eligible women only when the procedure is necessary to save their lives or when the pregnancy is a result of rape or incest, the challenged regulation imposes disparately severe restrictions on women's access to medically necessary care, in violation of the state equal rights amendment.

42. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates the state's equal rights amendment.

WHEREFORE, Plaintiffs respectfully request that the Court:

1) temporarily restrain Defendant to preserve the status quo, by continuing to afford state Medicaid coverage consistent with the regulation adopted on December 1, 1994 and presently in effect, pending permanent relief ordering nondiscriminatory funding for abortion services in New Mexico's Medical Assistance Program;

2) preliminarily enjoin Defendant to preserve the status quo, by continuing to afford state

Medicaid coverage consistent with the regulation adopted on December 1, 1994 and presently in effect, pending permanent relief ordering nondiscriminatory funding for abortion services in new Mexico's Medical Assistance Program;

3) declare that women otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program are entitled under the New Mexico Constitution to nondiscriminatory funding of abortion services;

4) permanently enjoin enforcement of MAD Reg. 766, insofar as it denies state Medicaid coverage for medically necessary abortions or otherwise subjects abortion services to discriminatory treatment; and

5) grant such other and further relief as the Court may deem just and proper, including costs and attorneys' fees.

Respectfully submitted,

/s/ Maureen Sanders

**Maureen Sanders**
445 Carlisle Ave., NE
Albuquerque, NM 87106
(505) 268-9914

**Ann Scales**
1312 Delamar, NW
Albuquerque, NM 87107
(505) 344-4800

**David Stout**
Carpenter & Chavez, P.C.
1600 University Ave., NE, #B
Albuquerque, NM 87102-2124
(505) 243-1336

**J. Michele Guttmann**
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

**Philip B. Davis**
Co-Legal Director,
ACLU of New Mexico
814 Marquette NW
Albuquerque, NM 87102
(505) 242-1904

/s/ Louise Melling
**Louise Melling**
**Natalie Gomez**
Reproductive Freedom Project
American Civil Liberties
Union Foundation
132 W. 43rd St., 7th Fl.
New York, NY 10036
(212) 944-9800

**Catherine Albisa**
**Priscilla Smith**
Center for Reproductive Law
& Policy
120 Wall St., 18th Fl.
New York, NY 10005
(212) 514-5534

**Cynthia Fry**
P.O. Drawer 40
Albuquerque, NM 87103
(505) 764-6039

*Attorneys for Plaintiffs*

*Of Counsel:*
**Roger Evans**
Legal Action for Reproductive
Rights Planned Parenthood
Federation of America
810 Seventh Avenue
New York, NY 10019
(212) 261-4708

**EXHIBIT 2**

**NEW MEXICO HUMAN SERVICES DEPARTMENT**

(SEAL) (LOGO)

**HUMAN SERVICES REGISTER**

---

**I. DEPARTMENT**

NEW MEXICO HUMAN SERVICES DEPARTMENT

**II. SUBJECT**

PREGNANCY TERMINATION PROCEDURES

**III. PROGRAM AFFECTED**

(TITLE XIX) MEDICAID

**IV. ACTION**

PROPOSED REGULATIONS

**V. BACKGROUND SUMMARY**

The New Mexico Human Services Register, Volume 17, No. 85, dated November 28, 1994, issued final regulations governing pregnancy termination procedures. These proposed regulations would revise the November 28, 1994 regulations to limit Medicaid coverage of abortions to those conditions reimbursed under federal law. They include:

1. the procedure is necessary to save the life of the mother,

2. the pregnancy is a result of rape or incest, or if not reported, the patient is not physically or emotionally able to report the incident; or

3. the procedure is necessary to terminate an ectopic pregnancy.

## VI. REGULATIONS

These regulations will supersede regulations currently in section 766 Pregnancy Termination Procedures. A copy of the proposed regulations may be requested by contacting the Medical Assistance Division at 827-3100.

## VII. EFFECTIVE DATE

The Department proposes to implement these regulations effective May 1, 1995.

## VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed regulations will be held at 9:00 a.m., Friday, April 7, 1995 at Apodaca Hall in the PERA Building at the corner of Paseo de Peralta and Old Santa Fe Trail in Santa Fe, New Mexico. Parking accessible to persons with physical impairments will be available.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Department toll free at 1-800-432-6217, in Santa Fe at 827-9454, or through the New Mexico relay system, 1-800-659-8331. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

## IX. ADDRESS

Interested persons may address written or recorded comments to:

Eugene D. Lovato, PhD., Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later than 5:00 p.m., Friday, April 7, 1995. Written and recorded comments will be given the same consideration as oral comments made at the public hearing.

## X. PUBLICATIONS

Publication of these regulations approved on February 20, 1995 by:

/s/ Eugene D. Lovato
EUGENE D. LOVATO,
PHD., SECRETARY
HUMAN SERVICES
DEPARTMENT 2-20-95

*EXHIBIT 3*

**154 P.2d 257**

**ARNOLD v. STATE.**

**No. 4866.**

Supreme Court of New Mexico.

Dec. 16, 1944.

Appeal from District Court, Santa Fe County; William J. Barker, Judge.

Suit by Herman Arnold against the State of New Mexico to have a statute declared unconstitutional. From a judgment overruling defendant's motion to dismiss the suit on ground that state was sued without its consent, defendant appeals.

Reversed and remanded with direction to sustain defendant's motion.

C. C. McCulloh, Atty. Gen., and Robert W. Ward, Asst. Atty. Gen., for appellant.

J. Benson Newell, of Las Cruces, for appellee.

SADLER, Chief Justice.

The decisive question, if answered negatively, is whether 1941 Comp. § 25-603 constitutes a general consent on the part of the state to be sued under the provisions of the Declaratory Judgments Act, L.1935, c. 143. Our former decision in Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027, supplies a negative answer to the question and we adhere to that decision on this appeal.

*The plaintiff, who is appellee before this court,* sued the state, securing service on the Governor and the Attorney General pursuant to Trial Court Rule 57(b), 1941 Comp. § 19-101, Rule 57(b). The petition disclosed that one Louise M. Arnold died on December 30, 1943, at Alamogordo, New Mexico, at the age of 92; that she was the widow of plaintiff's deceased brother and that the deceased husband and wife had acquired substantial real and personal community property during their marriage; that Louise M. Arnold had never remarried after the death of her husband; that during her lifetime and apparently after her husband's death she had executed a last will leaving practically her entire estate to the plaintiff but that all efforts to locate it had failed, the implication of the petition being that it had been secreted or destroyed by certain persons, husband and wife, who lived with decedent some months prior to her death and for whose benefit decedent had transferred substantially all her property in trust in exchange for their promise to care for, support and furnish her decent burial.

The petition further alleged that decedent had on deposit in a certain bank in Alamogordo at the time of her death, seemingly not subject to the trust, the sum of $500. It also alleged facts which, if true, would take certain personal property described in the trust deed, out from under the terms of the trust and render it, along with the cash in bank, subject to descent. Then, followed an allegation that under the provisions of 1941 Comp. § 31-116, purportedly repealed by L.1943, c. 17, there being no issue, where the surviving spouse shall die intestate as in this case, the community property of the marriage descends to the heirs of the husband and wife,

the implication being that he is the sole heir of the deceased husband. The repeal of section 31-116, under which the plaintiff hopes to inherit, was assailed upon the constitutional ground that the subject of the repealing act was not clearly expressed in the title in that it referred only to the specified section of the 1941 Compilation embracing the act sought to be repealed, in alleged violation of Art. IV, § 16 of the state constitution. The state's interest was made to rest on the allegation that if the repealing act was effective, then all property of the decedent, including the bank balance of $500, would escheat to the state in that she must be deemed to have died intestate and without heirs.

With this background, the plaintiff then set forth in a concluding paragraph of his petition the language relied upon to invoke relief under the Declaratory Judgments Act, as follows: "Plaintiff alleges that there is an actual existing controversy over the constitutionality of said Chap. 17 of the Laws of 1943, between him and the State of New Mexico, – the State contending that said law is constitutional and that a said Sec. 31-116 of the 1941 Code is repealed; and the plaintiff contending same is effective because of the unconstitutionality of the repealing act."

The state appeared by the Attorney General and filed its motion to dismiss, setting up several grounds, the first of which is as follows: "That plaintiff's petition shows on its face that this Court is without jurisdiction over the defendant in that defendant is the State of New Mexico and that plaintiff is attempting to sue the State of New Mexico without its consent."

In State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059, 1060, we said: "It is a fundamental doctrine at common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission."

Indeed, so fundamental is the lack of consent that it was treated as jurisdictional in the foregoing case and permitted to be raised for the first time in this court.

The plaintiff relies upon the following language found in 1941 Comp. § 25-603 of the Declaratory Judgments Act as constituting general consent on the part of the state to be sued under the provisions of the act, subject to the conditions therein stated, to-wit: "For the purpose of this act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, or any statute thereof."

In Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027, 1032, in a case decided only a few years following enactment of this legislation, the likelihood that this language would soon be relied upon as constituting a general immunity on the part of the state to be sued under the provisions of the act was sensed. The matter was considered and we said: " * * * We take this first opportunity to correct any impression that section 3 of the act is a general consent on the part of the state to be sued under its provisions. We are agreed that it has no such meaning and has no greater effect, in so far as this consideration is concerned, than merely to permit parties to sue the state under the act where the state's

consent to be sued otherwise exists and the facts warrant suit."

It was a mooted question in that case whether section 3 of the act (25-603), which is not found in the uniform and federal Declaratory Judgments Acts, constitutes an enlargement of the jurisdiction to enter declaratory judgments in certain instances where the state or a state official is the defendant and the construction of the state constitution or a statute is called for. Apropos this question, we said:

" * * * On the one side it is argued that if not an enlargement of jurisdiction, its presence in the act is meaningless, suit against the state or state officials in the instances enumerated being maintainable under section 1 without the aid of section 3. * * *

"On the other hand it is said that instead of enlarging section 3 limits jurisdiction; that its purpose is two-fold: First, to remove any doubt about applicability of the act to the state and state officials where consent on the part of the state to be sued otherwise exists; and, second, to limit the right to have declarations, even in those instances, subject to the conditions named, to cases involving the construction of the state constitution or of some statute. We pass the question. Any present declaration we might make upon the subject would be gratuitous in view of the fact that we find jurisdiction to exist under section 1."

In Dougherty v. Vidal, 37 N.M. 256, 21 P.2d 90, 92, we said:

"Both legally and practically we consider the state's immunity from suit too important a matter to be trifled with. 'A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.' Mr. Justice Holmes, in Kawananakoa v. Polyblank, 205 U.S. 349, 27 S.Ct. 526, 527, 51 L.Ed. 834. The Legislature, not to mention the courts, should proceed slowly and with caution in subjecting the state itself to the exigencies of litigation. Langford v. United States, 101 U.S. [341], 11 Otto 341, 25 L.Ed. 1010.

"Moreover, a question of jurisdiction arises. This court is the creature of the sovereign state. It can have no natural or presumptive jurisdiction over its creator. Such jurisdiction as we have over the state we must trace to the Constitution or to that branch of government which declares the state's public policy. In the absence of plain consent, to entertain a suit against the state is judicial usurpation.

"Furthermore, 'It is usually said that statutes authorizing suits against the state are to be strictly construed, since they are in derogation of the state's sovereignty.' 59 C.J. 303, 25 R.C.L. 416, Lewis' Sutherland, St.Const. (2d Ed.) § 558."

Other New Mexico cases dealing generally with the subject of the state's immunity from suit are Looney v. Stryker, 31 N.M. 557, 249 P. 112, 50 A.L.R. 1404, and American Trust & Savings Bank of Albuquerque v.

Scobee, 29 N.M. 436, 224 P. 788. See, also, Annotations: 42 A.L.R. 477, 50 A.L.R. 1408.

Confronted, therefore, in Taos County Board of Education v. Sedillo, supra, with a statute which, if plaintiff's contention be correct, opens wide the door to suits against the state, and mindful of the strict construction with which such statutes are interpreted, we looked for another meaning than that which was suggested for it. And, other meanings appearing, as pointed out in the Sedillo case, supra, falling short of omnibus authority to sue the state, we inserted in the opinion in that case the cautionary language now so vigorously challenged by the plaintiff. We see no reason to repudiate it. The conclusion we reach is supported by the discussion to be found in Borchard on Declaratory Judgments (2d Ed.) 370-374.

It follows from what has been said that the judgment of the trial court should be reversed and the cause remanded with a direction to sustain defendant's motion to dismiss the suit as one against the state initiated without its consent.

It is so ordered.

MABRY, BRICE, BICKLEY, and THREET, JJ., concur.

**EXHIBIT 4**

Filed July 3, 1995 in Santa Fe District Court

**RELIEF:**

It is the opinion of this Court that MAD Reg. 766 is void and uneforceable [sic] in that it deprives indigent women of our state rights secured to them by the New Mexico State Constitution. The Court's ruling declares the regulation unconstitutional and therefore void. Such a ruling has the effect of rendering the regulation ineffeective [sic]. Thus, the Department is permanently enjoined from enforcing or acting pursuant to the regulation.

The application for permanent injunction is **GRANTED.**

**EXHIBIT 5**

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 95-867(C)

NEW MEXICO RIGHT TO CHOOSE/NARAL, ABORTION AND REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, M.D., and LEWIS H. KOPLICK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant,

and

EUGENE J. KLECAN and JOHN R., LINTON,

Defendants in Intervention.

**ORDER OF JUDGMENT**
(Endorsed July 26, 1995)

Based upon the submissions and arguments of the parties, the record before the Court, and my Memorandum Opinion previously filed in this case,

IT IS ORDERED that:

1) Plaintiffs' motion for summary judgment is hereby granted;

2) Under the New Mexico Constitution women otherwise eligible for full coverage of

pregnancy-related services in New Mexico's Medicaid Program are entitled to non-discriminatory funding of abortion services;

3) The Defendant, her agents and her successors in office are hereby permanently enjoined from enforcing the Final Regulation Governing Pregnancy Termination Procedures. N.M. Human Serv. Reg., Apr. 18, 1995, insofar as it denies state Medicaid coverage for medically necessary abortions or otherwise subjects abortion services to discriminatory treatment;

4) Plaintiffs' request for attorneys' fees is denied; and

5) Plaintiffs are entitled to reasonable costs and shall submit a cost bill within 20 days of this Order pursuant to LR1-307 of the First Judicial District.

/s/ STEVE HERRERA
Honorable Steve Herrera
District Court Judge

Submitted By:

/s/ Maureen A. Sanders
Maureen A. Sanders
Attorney for Plaintiffs

Approved Only as to Form:
Telephonically approved 7/24/95

/s/ _____
Don Buckner
Attorney for Defendant

Telephonically approved 7/15/95

/s/ _____
Eugene E. Klecan
Attorney for Intervenors

**EXHIBIT 6**

State of New Mexico
HUMAN SERVICES DEPARTMENT

(SEAL) (LOGO)

**HUMAN SERVICES REGISTER**

---

**I. DEPARTMENT**

NEW MEXICO HUMAN SERVICES DEPARTMENT

**II. SUBJECT**

PREGNANCY TERMINATION PROCEDURES

**III. PROGRAM AFFECTED**

(TITLE XIX) MEDICAID

**IV. ACTION**

PROPOSED REGULATIONS

**V. BACKGROUND SUMMARY**

Prevention of unwanted pregnancies is a priority of the New Mexico Human Services Department through its Medicaid Family Planning services as well as educational programs. Family Planning services are being expanded within Medicaid and educational outreach programs developed in conjunction with other state agencies to help insure accurate information is available to all New Mexicans regardless of age, location or financial status.

The Department of Human Services recognizes, however, that despite these efforts, unwanted pregnancies occur and that a woman's right to terminate a pregnancy is

constitutionally protected. During the past year, it was brought to the Department's attention that Medicaid eligible women are being denied coverage for pregnancy termination procedures they are otherwise legally entitled to receive, such denial in derogation of their constitutional rights. After researching the issue thoroughly and to avoid litigation that the Attorney General and the Department determined would be both expensive and unsuccessful, the Department has elected to promulgate regulations establishing the right of female Medicaid recipients to terminate a pregnancy pursuant to rules and regulations.

The proposed regulations provide that the termination procedure be "medically necessary", and that specific informed consent be given by the patient prior to the procedure. The regulations also provide for pre or post decision counseling for the patient, such counseling is paid for by Medicaid when furnished by approved providers.

## VI. REGULATIONS

These regulations will supersede regulation in Section 310.0104(K) of existing regulations or Physician Services and be incorporated as § 766 of the Medicaid manual as follows:

The New Mexico Medical Assistance Program (Medicaid) pays for medically necessary health services furnished to eligible recipients, including services to terminate pregnancy.

This section describes eligible providers, covered services, service limitations, and general reimbursement methodology.

### 766.1 Eligible Providers

Upon approval of New Mexico Medical Assistance Program Provider Participation Applications by the New Mexico Medical Assistance Division (MAD), the following providers are eligible to be reimbursed for furnishing services to terminate pregnancy and/or pre or post decision counseling or psychological services:

1. Individuals licensed as doctors of medicine or osteopathy;
2. Hospitals or clinics; and
3. Individuals licensed to furnish psychological services.

Upon enrollment, providers sign a provider contract and receive a packet of information, including Medicaid program policies, billing instructions, utilization review instructions, and other pertinent material from MAD.

### 766.2 Provider Responsibilities

Providers who furnish services to Medicaid recipients must comply with all specified Medicaid participation requirements. See. Section 701, General Provider Policies.

Providers must verify that individuals are eligible for Medicaid at the time services are furnished and determine if Medicaid recipients have other health insurance.

Providers must maintain records which are sufficient to fully disclose the extent and nature of the services provided to recipients. See. Section 701, General Provider Policies. The physician certification form and a copy of the signed informed consent must be attached to the Medicaid claim form.

### 766.3 Covered Services and Service Limitations

**766.31 Coverage of Termination Procedures** Medicaid covers services to terminate pregnancy under the following conditions:

1. The life of the recipient will be endangered should the pregnancy be allowed to continue, as certified by the treating physician;

2. The procedure is required to terminate a pregnancy resulting from rape or incest, as certified by the treating physician and/or the appropriate reporting agency;

3. The procedure is necessary for termination of an ectopic pregnancy; or

4. The procedure is medically necessary, which means that the treating physician certifies that in his/her best medical judgement the termination is necessary because of physical, emotional, psychological, familial, or age factors (or any combination of these) relevant to the recipient.

**766.32 Pre-Decision Counseling** Medicaid covers independent pre-decision counseling services furnished by an eligible Medicaid provider. Counseling services must be furnished in a neutral unbiased manner and

include information about procedure alternatives and options for assistance.

**766.33 Post-Decision Counseling** Medicaid also covers post decision counseling services furnished by an eligible psychological service provider. See. Section 717, Psychiatric and Psychology Services.

### 766.4 Noncovered Services

Services to terminate pregnancy are subject to the limitations and coverage of services which exist for other Medicaid services. See. Section 602, General Noncovered Services. Medicaid does not cover the performance of elective termination procedures.

### 766.5 Prior Approval and Utilization Review

All Medicaid services are subject to utilization review for medical necessity and program compliance. Reviews may be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See. Section 705, Prior Approval and Utilization Review. Upon enrollment, providers receive instructions and documentation forms necessary for prior approval and claims processing.

**766.51 Prior Approval** Services to terminate pregnancy do not require prior approval from MAD or its designee.

**766.52 Eligibility Determination** Providers must verify that individuals are eligible for Medicaid at the time services are furnished and determine if Medicaid recipients have other health insurance.

**766.53 Reconsideration** Providers who disagree with review decisions can request a re-review and a reconsideration. See. Section 953, Reconsideration of Utilization Review Decisions.

### 766.6 Informed Consent

Voluntary, informed consent by the recipient must be given to the provider prior to the procedure to terminate pregnancy. Such consent is valid for thirty (30) days from the date of signature.

**766.61 Required Acknowledgements** In signing the consent, the recipient must acknowledge that she has received the following information:

1. Alternatives to pregnancy termination;
2. Medical procedure(s) to be used;
3. Possibility of physical and/or mental side effects from the performance of the procedure; and
4. Right to receive pre or post decision counseling services from an independent Medicaid provider.

**766.62 Record Retention** A dated and signed copy of the consent, with counseling referral numbers, must be given to the recipient. The provider must keep the original with the recipient's medical records.

**766.63 Consent or Notification for Minors** Emancipated or legally married minors may give informed consent.

Informed consent for an unemancipated minor or a minor not legally married must be dated and signed by a parent, legal guardian, or other adult acting "in loco parentis" to the minor.

If the minor states that consent from a parent, guardian, or other adult acting in loco parentis is not available for personal reasons, the treating physician shall certify that fact and refer the minor to an independent counselor who shall meet with the minor and confirm in writing to the treating physician that the minor is capable of giving informed consent.

**766.7 Reimbursement**

Medical providers must submit claims for reimbursement on the HCFA 1500 or UB92 claim forms or their successors, based on provider type. Certification of medical necessity, copy of the informed consent, physician certification, and any other required documentation must be submitted with the claim. See. Section 702, Billing for Medicaid Services. Instructions on documentation, billing, and claims processing are sent to approved Medicaid providers.

Reimbursement for the performance of services to terminate pregnancy is made at the lesser of the following:

1. The provider's billed charge; or

2. The MAD fee schedule for the specific service or procedure. See. Billing information in specific provider sections for the fee schedule.

(A) The provider's billed charge must be their usual and customary charge for services.

(B) "Usual and customary charge" refers to the amount which an individual provider charges the general public in the majority of cases for a specific procedure or service.

## VII. EFFECTIVE DATE

The Department proposes to implement these regulations effective October 1, 1994.

## VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed regulations will be held at 9:00 a.m., Thursday, September 1, 1994, at the State Capitol Building, (corner of Paseo de Peralta and Old Santa Fe Trial), Room 307, Santa Fe, New Mexico. Parking accessible to persons with physical impairments will be available.

If this regulation is needed in other than printed form, or if persons interested in attending the hearing require other accommodations, please contact the Medical Assistance Division toll free 1-800-432-6217, in Santa Fe at 827-3100, or through the New Mexico Relay System, toll free 1-800-659-8331 at least ten (10) days before the hearing.

## IX. ADDRESS

Interested persons may address written or recorded comments to:

Richard W. Heim, Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later that 5:00 p.m., Thursday, September 1, 1994. Written and recorded comments will be given the same consideration as oral comments made at the public hearing.

## X. PUBLICATIONS

Publication of these regulations approved on July 19, 1994.

/s/ Richard W. Heim
RICHARD W. HEIM, SECRETARY
HUMAN SERVICES DEPARTMENT

**EXHIBIT 7**

SUPREME COURT STATE OF NEW MEXICO

NO. 23,239

NEW MEXICO RIGHT TO CHOOSE/NARAL, ABORTION AND REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF THE RIO GRANDE, CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, MD, AND LEWIS KOPLIK, M.D.,

Plaintiffs-Appellees and
Cross Appellants,

-vs-

(Herrera, Steve, D.J.)

and

DOROTHY DANSFELSER, Secretary of the New Mexico Human Services Dept.,

Defendants-Appellant and
Cross-Appellee,

and

EUGENE E. KLECAN and DONALD SCHAURETE,

Defendants-in-Intervention and
Cross-Appellants, Appellants.

## MOTION FOR STAY, PENDING A DECISION FROM THIS COURT ON THE MERITS OF THE APPEAL

(Filed May 4, 1998)

Denied May 6, 1998
See Exhibit 8

Come now the Intervenors, Klecan and Schaurete, in behalf of the unborn and the taxpayers of New Mexico and in support of their Motion for a Stay, alleged:

1) The issue of this case below before Santa Fe District Court Judge Steve Herrera and on this Appeal is Abortions of New Mexico unborn solely at taxpayers expense.

2) Harris -v- McRae et al 448 US 297, 65 L Ed 2nd 784, 100 S Ct 2671 reh den 448 US 917, 65 L Ed 2nd 1180, 101 S Ct 39 decided that the above *could not* be done with US taxpayers' funds.

3) A footnote in Harris -v- McRae Supra said that the restriction did not necessarily prevent a State from using it s [sic] own tax funds for abortions for women below the poverty line. The Medicaid Act therefor says a joint Federal State law could not be used for abortions at joint Federal State expense.

4) Pursuant to the footnote in Harris -v- McRae Supra, suits were instituted in various states seeking State funding for abortions for women below the poverty line.

5) This case was one of several cases filed in State Courts as a result of the footnote of Harris -v- McRae Supra. Judge Steve Herrera was the presiding State Court Judge in the New Mexico case filed in April 1995.

6) Intervenors, the parties seeking this Stay were allowed into that case by Judge Herrera, saying that

the Intervenors represented Parties not otherwise represented. See the caption above for the parties Plaintiff and Defendant. They have not changed except that the Secretary for the H.S.D. Defendant has changed. The issues remain the same.

7) FINAL JUDGMENT was filed July 26, 1995, which granted an Injunction to the Plaintiffs and allowed the continuance of abortions solely at New Mexico Taxpayers' expense, which began December 1, 1994 as the result of an H.S.D. Resolution under the prior administration of the thenChief [sic] Executive. The Federal Act interpreted in Harris -v- McRae Supra is known as the Medicaid Act, a Federal Statute which allowed State participation and New Mexico did participate by a Statute of it s [sic] own on approximately 80%-20% basis with the Federal Government funding the 80%. Harris -v- McRae Supra prevented the Medicaid Act from being used as a basis for funding abortions at U.S. Taxpayers' expense for pregnant women below the poverty line. Judge Herrera held that the State of New Mexico was enjoined from interferring with the funding of New Mexico pregnant womens' abortions. This necessarily took New Mexico out of Federal State funding because of the ruling by the U.S. Supreme Court in Harris -v- McRae Supra.

8) It is of *essential importance* that the Plaintiffs below did not include a pregnant woman as a Party. The Plaintiffs below were abortion providers and abortion doctors. (See caption.) Exhibit A

9) The case on Appeal was briefed extensively with several Amici and the Attorney General submitting Briefs, all of which was completed by February 1997.

10) Oral Argument was set by this Court April 9, 1996, copy of the Notice is attached as Exhibit A. It is noted that the listing of the Appellees confirm what

we just said in the prior paragraph. There were and are no pregnant women listed as Parties. This is in direct variance from Roe -vs- Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 739 (1973), where Jane Roe was claimed to be a pregnant woman. Wade was the District Attorney of Dallas County and it was a criminal case for violation of the Texas Anti-Abortion Act.

11) Thirteen days before the scheduled Hearing for Oral Arguments, April 9, 1996 the New Mexico Supreme Court vacated the April 9th setting for Oral Arguments. The earliest and the latest dates for rescheduling were stated in the Order and were August 1996 and November 1996. Exhibit B. The Oral Arguments were eventually reset for June 30, 1997 and did take place on that date. No decision has been forthcoming to date.

12) The fact that the New Mexico Supreme Court did not reset the Oral Arguments by November 1996 as stated in Exhibit B, a letter to all Counsel, has resulted in large loss of life to New Mexico unborn and loss of funds by New Mexico taxpayers. This has continued up to the present date and is the factual basis for thie [sic] Motion to Stay the continuation of abortions solely at taxpayers' expense.

13) In a true sense the Order of March 28, 1996 Exhibit A has caused irreparable harm to New Mexico's unborn and its taxpayers. Exhibit, labelled Appendix X, show statistics furnished by the H.S.D. on the numbers of abortions performed and monies expended solely by New Mexico taxpayers. We are attaching as Appendix X Pages on the number of abortions performed and the taxpayers funds expended during the period 7/01/96 through 6/30/97. There are statistics covering the other periods while this case has been on Appeal which

are comparable as to loss of Life of the unborn and taxpayers funds expended. The Appendix X in twenty-five pages shows slightly more than $240.00 per abortion and each page of the twenty-five page exhibit contains 50 (fifty) abortions, which is $12,000.00 per page. That dollar amount, $12,000.00, times 25 pages is the sum of $300,000.00 all from New Mexico taxpayers and is continuing. There are comparable statistics in H.S.D.'s records which greatly enlarge the number of abortions performed and taxpayers' funds expended. Irreparable harm to the unborn and to the taxpayers is scheduled for every day in the future unless relief is granted by this Motion.

14) Exhibit B, the March 28, 1996 letter vacating Oral Arguments says "Vacating the April setting is in everyone's best interest". The loss of life and the loss of taxpayers funds shows this not to be so. The above would be true only if the Order of March 28th had stayed the abortions while the matter stated as reasons for the Order were being worked out. To date that has not occurred.

15) Exhibit B, Paragraph 2 of the March 28th Order places the reason for the Order as an internal situation within the Supreme Court, that is Judge Frosts' retirement; also the Order states that the Judicial Nominating Commission needs time for a list of names to replace Judge Frost. The plight of New Mexico's unborn and New Mexico taxpayers is shown on the statistics described in Appendix X. The above represents adequate grounds for a Stay at this time pending a decision on the merits of this Appeal.

16) The long delay in the New Mexico Supreme Court while abortions continue forcefully argues for the

cessation of abortions until a decision is forthcoming from this Court.

17) The Chief Justice of the New Mexico Supreme Court has authority to grant the Stay requested.

18) No one thought the decision would take this long especially District Judge Herrera who early on urged that this proceed swiftly into the Supreme Court for their decision. His recommendation has not been followed at the expense of the unborn and the New Mexico taxpayers.

19) Although Exhibit B, of March 28, 1996 letter vacating the original Oral Argument setting was not realized, still it is New Mexico's unborn and New Mexico taxpayers who have suffered. During that period, the Plaintiffs, the abortion providers and doctors have secured everything that they asked for.

20) This leads us to a consideration of matters raised before Judge Herrera and covered in the transcript. The Defendant H.S.D. and the Intervenors, as one point of several, Appeal points urged and argued extensively that the case was not properly brought by the Plaintiffs and should have been brought by a pregnant woman who would be within the poverty lines. As a basis of the above, we said New Mexico Rules of Civil Procedure require that an action must be brought in the names of the real parties in interest, which is a pregnant woman. This point establishes by law that there is merit to the Defendants and Intervenors defense. It is not the only defense. Others are present such as no Legislative Act. See Transcript 75, lines 15 to 22.

21) The Transcript of the Arguments by Mr. Bruckner for the H.S.D. and Mr. Klecan for the Intervenors show extensively the position that the New Mexico Legislature has not acted. More treatment is given in

the Transcript 63 through Transcript 78 which contains arguments by Mr. Bruckner and questions by the Court. Transcript 78 through 86 contains arguments and authorities by Mr. Klecan. A fair analysis of those arguments shows that the Defendants and Intervenor had a strong position. This in itself is support for this Motion to Stay.

22) Since there is no Supreme Court decision one way or the other, fundamental equity and equality urges that we should be entitled to a Stay if for no other reason than that the Plaintiffs and Appellee have had their way and have been treated as victors as a result of the favorable decision in the Lower Court, but even there the trial Judge thought the case would be decided on Appeal long before this date.

23) We conclude with an analogy to Capital Punishment in Criminal cases. If an Appeal or a Review is pending as permitted by law, the life of the convicted Defendant cannot be taken while the Appeal or Review is pending.

PRAYER FOR RELIEF: We request an immediate Stay of abortions to New Mexico's unborn at New Mexico taxpayers' expense until the Appeal is decided by the Supreme Court. This is addressed to the Chief Justice of the Supreme Court as provided by the customary procedures for such matters.

Exhibits not included in Petition to U.S. Supreme Court as repetitions.

/s/ Eugene E. Klecan
EUGENE E. KLECAN, Attorney for
Intervenors and Appellants on Appeal
5613 Fair Oak Trail Ne
Albuquerque, New Mexico 87109-3209

Because of the nature of the Motion, concurrence of Opposing Counsel was not sought.

Copy of the foregoing is being served and/or mailed to all parties to the Appeal this 4 day of May, 1998.

/s/ Eugene E. Klecan

EXHIBIT 8

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

May 6, 1998

NO. 23,239

NEW MEXICO RIGHT to CHOOSE/ NARAL, PLANNED PARENTHOOD OF THE RIO GRANDE, CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, M.D., and LEWIS KOPLIK, M.D.,

Plaintiffs-Appellees and
Cross-Appellants,

vs.

DUKE RODRIGUEZ, Secretary of the New Mexico Human Services Department,

Defendants-Appellant and
Cross-Appellee,

and

EUGENE E. KLECAN and DONALD SCHAURETE,

Defendants-in-Intervention and
Appellants-Cross-Appellees.

ORDER

WHEREAS, this matter came on for consideration upon intervenors' motion for stay pending a decision from the court on the merits of the appeal, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion request hereby is DENIED.

[SEAL]
ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson

Clerk of the Supreme Court
of the State of New Mexico

## EXHIBIT 9

### Payments by The New Mexico Medicaid Program for Abortions

| 1996 Dates of Service* | Number | Payment |
|---|---|---|
| Medically Necessary (state funded): | 1297 | $267,851.82 |
| Life Endangerment (with federal financial participation): | 1 | $ 187.03 |
| Rape (with federal financial participation) | 0 | |
| Incest (with federal financial participation) | 0 | |
| **1997 Dates of Service*** | | |
| Medically Necessary (state funded): | 247 | $ 50,089.61 |
| Life Endangerment (with federal financial participation): | 0 | |
| Rape (with federal financial participation) | 0 | |
| Incest (with federal financial participation) | 0 | |

* data based on payments made through April 3, 1997

**EXHIBIT 10**

**[SEAL]**

**Supreme Court of New Mexico**
P.O. BOX 848
**Santa Fe, New Mexico**
**87504-0848**
(505) 827-4860

KATHLEEN JO GIBSON, Esq.
CHIEF CLERK

STREET ADDRESS
SUPREME COURT BUILDING
237 DON GASPAR AVE., ROOM 104
SANTA FE, NEW MEXICO 87503

March 28, 1996

TO: ALL COUNSEL OF RECORD

RE: NO. 23,239, *N. M. Right to Choose/Naral, et al. v. Danfelser*

Dear Counsel:

ENCLOSED IS AN ORDER VACATING THE ORAL ARGUMENT SETTING ON TUESDAY, APRIL 9, 1996, AT 1:30 P.M. ORAL ARGUMENT WILL BE RESET AT THE EARLIEST ON THE AUGUST 1996 CALENDAR, BUT NOT LATER THAN OCTOBER OR NOVEMBER 1996.

BECAUSE OF THE IMPORTANT NATURE OF THE ISSUES, JUSTICE FROST'S RETIREMENT EFFECTIVE MAY 31, 1996, AND THE FACT THAT THE GOVERNOR WILL HAVE A LIST OF NAMES FROM THE JUDICIAL NOMINATING COMMISSION ON JUNE 4TH, THE COURT FEELS THAT VACATING THE APRIL SETTING IS IN EVERYONE'S BEST INTEREST.

THE ORDER ISSUED TODAY REGARDING TIME ALLOTMENTS AND ORDER OF PRESENTATION WILL BE IN EFFECT FOR THE NEW SETTING DATE.

SHOULD YOU HAVE ANY QUESTIONS, PLEASE DO NOT HESITATE TO CONTACT ME.

Cordially,

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
Supreme Court of the State of New Mexico

enclosure

c: file

---

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**March 28, 1996**

NO. 23,239

**NEW MEXICO RIGHT TO CHOOSE/ NARAL, ABORTION AND REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF THE RIO GRANDE, CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, M.D., and LEWIS KOPLIK, M.D.,**

Plaintiffs-Appellees and
Cross-Appellants,

vs.

**DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,**

Defendants-Appellant and
Cross-Appellee,

and

**EUGENE E. KLECAN and DONALD SCHAURETE,**

Defendants-in-Intervention and
Appellants-Cross-Appellees.

**ORDER**

This matter having come on for consideration upon the Court's own motion to vacate oral argument set for Tuesday, April 9, 1996, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that oral argument set for Tuesday, April 9, 1996, hereby is VACATED and shall be rescheduled at a later date.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson

Clerk of the Supreme Court
of the State of New Mexico

## EXHIBIT 11

### Sovereign Immunity Argument

This means freedom from suit against the State or any of its political divisions or subdivisions. It applies obviously to this suit which is against HSD, a department of the executive branch of the government. It is a suit by four abortion doctors and three abortion providers, all non-governmental plaintiffs. Just as the doctrine states, the Complaint literally comes right within the scope of sovereign immunity. This doctrine precedes even constitutional provisions and precedes the fundamental of jurisdiction, although it also means lack of jurisdiction, which can be raised at any time, even in the Supreme Court. However, this doctrine was raised in the lower court and argued extensively therein on June 5, 1995. TR. C, p. 57 et seq. If this doctrine is accepted, the Complaint was dead on arrival in the State Court of Santa Fe County. Unless this doctrine is observed, the foundation for the State of New Mexico government or any government is undermined. New Mexico has long held to this doctrine. *Arnold v. State of New Mexico,* 48 N.M. 596, 155 P.2d 257.